Supreme Court, U.S.
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No. ____

In The

# Supreme Court of the United States

October Term, 1997

WESTERN RESOURCES, INC.,
Receiver of the assets of the
Victor Muscat Testamentary Trusts,

*Petitioner,*

v.

STATE OF CALIFORNIA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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82 pp

## QUESTION PRESENTED FOR REVIEW

Whether the Eleventh Amendment to the United States Constitution bars the exercise of jurisdiction by a United States District Court against a receiver appointed by the superior court of another state to manage the assets of a trust held by the superior court in custodia legis.

## LIST OF ALL PARTIES TO THE PROCEEDINGS

The following parties were present in the trial court action by way of a complaint filed by the State of California and cross-complaints herein: Western Resources, Inc.,[1]; Albert Campbell; Charles Tackman; Robert Tiberiis; Vic Inc.; Clay McGowan; Middleton Moulding Co.; Sierra Pacific Industries; Fay McGowan; Gerald Richter; Linda Richter; Tupack Verpackungen Gesellschaft MBH; the City of Chico; Union Pacific Railroad Company; the United States of America; Victor Tube Corp.; Advanced Monobloc Corp.; CCL Industries, Inc.; Louisiana Pacific-Corp. and Victor H. Muscat, Jr.

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[1] Corporate Disclosure Statement: Western Resources, Inc. does not issue shares to the public, nor does it have any parent companies, subsidiaries or affiliates that have issued shares to the public. WRI is being sued in its capacity as a state-court appointed receiver and not in its capacity as a corporation.

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## PETITION FOR WRIT OF CERTIORARI

Western Resources, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this matter on or about March 9, 1998, in order to resolve the important constitutional issue presented herein.

## OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Ninth Circuit that gives rise to this petition is reprinted in Appendix A hereto, pages 1a-8a.

The opinion of the United States District Court for the Eastern District of California from which Western Resources, Inc. has appealed is unpublished. It is reprinted in Appendix A hereto, pages 57a-58a.

## STATEMENT OF JURISDICTION

On January 28, 1997, the United States District Court for the Eastern District of California denied the motion for summary judgment of Western Resources, Inc. brought on the ground of Western Resources, Inc.'s immunity from suit pursuant to the Eleventh Amendment of the United States Constitution. (Appendix, pages A57-A58 ("A-57-58").)

Western Resources, Inc. filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit on February 26, 1997. The Ninth Circuit affirmed the District

Court decision in a published opinion filed on or about March 9, 1998. The Ninth Circuit denied Western Resources, Inc.'s timely petition for rehearing and suggestion for rehearing en banc on April 21, 1998. (A-59.) This petition has been filed within 90 days of the Ninth Circuit's denial of the petition for rehearing or rehearing en banc and is therefore timely pursuant to Rules 13.1 and 13.4. This Court has jurisdiction under 28 U.S.C. section 1254.

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eleventh Amendment of the Constitution of the United States provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

Connecticut General Statutes, Chapter 52, section 504 (1994) provides, in pertinent part:

> "When any action is brought to or pending in the superior court in which an application is made for the appointment of a receiver, any judge of the superior court, when such court is not in session, after due notice given, may make such order in the action as the exigencies of the case may require, and may, from time to time, rescind and modify any such order. The judge shall cause his proceedings to be certified to the court in which the action may be pending, at its next session."

Connecticut General Statutes, Chapter 52, section 508 (1994) provides, in pertinent part:

> "Each such receiver shall, during the first week in April and in October in each year, sign, swear to and file with the clerk of the court by which he was appointed a full and detailed account of his actions as receiver for the preceding six months, together with a statement of all orders of court passed during the six months and the present condition and prospects of the property in his charge. Upon filing of the account, the receiver shall cause a motion for a hearing and approval of the account to be placed on the short calendar."

## STATEMENT OF THE CASE

### A. The Parties To This Action

Defendant and Petitioner Western Resources, Inc. ("WRI") is the receiver appointed by the Connecticut Superior Court to oversee and manage the assets of the testamentary trusts of Victor Muscat ("Muscat"). Plaintiff State of California ("California") filed this suit in April 1993 to recover expenses related to alleged toxic contamination in Chico, California which the State alleges was caused by, among others, Victor Industries Corporation, a California corporation in which Muscat is alleged to have held a significant interest until his death in 1975.

After Muscat's death, three individuals (Albert Campbell, Charles Tackman and Robert Tiberiis) were appointed to serve as executors of Muscat's estate and

trustees of Muscat's five testamentary trusts. Victor Industries ceased operation at the site at issue in 1984.

### B. California Sues The Executors And Trustees In Their Personal And Representative Capacities

In April 1993, California filed this suit in United States District Court for the Eastern District of California seeking, pursuant to federal statutory and pendant state-law remedies, both injunctive relief and recovery of costs associated with pollution remediation from Muscat's estate and testamentary trusts. California named Campbell and Tackman in their *individual* capacities as well as their capacities as executors and trustees of Muscat's estate and testamentary trusts. California also later named Tiberiis as a defendant in his individual capacity and as executor and trustee.[2]

### C. The Connecticut Superior Court Appoints WRI To Act As The Receiver For Muscat's Testamentary Trusts

Citing advancing age and deteriorating health, the trustees submitted their resignations in June 1993. Due to the lack of replacement trustees, in 1994 the Connecticut Superior Court placed the assets of the testamentary trusts into receivership on February 14, 1995, appointed WRI as its receiver, and the Superior Court took legal possession of the assets of the trusts in custodia legis of

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[2] After Robert Tackman died, California substituted the representatives of *his* estate as defendants in the action.

the Superior Court pursuant to settled Connecticut probate law. (A-9-10, 11-15; *Walsh v. Raymond*, 58 Conn. 251, 20 A. 464, 464 (Conn. 1889), see discussion, *infra*, pp.12-13.)[3] The Superior Court's approval is required for any action taken by its receiver, WRI, in connection with the trusts, including initiation or defense of any civil action, appraisal of receivership assets or payment to any beneficiaries or even to legal counsel. (A-11-15.)

### D. California Substitutes WRI Into This Action Without Prior Notice

On March 19, 1996, the District Court granted California's motion to substitute WRI into this action in place of Campbell and Tackman in their capacities as trustees for the testamentary trusts. (A-16-18.) The substitution and resulting exercise of personal jurisdiction over WRI was involuntary and done without notice either to WRI or the Connecticut Superior Court and without affording WRI a prior opportunity to be heard.[4]

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[3] Pursuant to the same settled legal principle, the Muscat testamentary trusts are empty shells containing no assets against which California can enforce a judgment in this action. (*Babcock, et al. v. African Methodist Episcopal Zion Soc. of Hartford, et al.*, 103 A. 665, 667 (Conn.1918).)

[4] California's action was in *direct* derogation of the following explicit provision in the Connecticut Superior Court's order dated April 3, 1995:

> "This Court has not granted permission to anyone, including the State of California, to sue the receiver, to make any attempt to substitute the receiver as a party in any legal action or to attempt to hold the receiver liable for any orders entered against the Muscat Trusts." (A-11.)

(footnote continues on page 6.)

### E. The District Court Denies WRI's Motion To Dismiss And Motion For Summary Judgment

On May 31, 1996, the District Court denied WRI's motion to dismiss and for alternative relief without addressing WRI's claim of immunity from suit under the Eleventh Amendment. WRI then filed a motion for summary judgment based solely upon assertion of Eleventh Amendment immunity which the District Court denied on January 28, 1997 on the ground (unsupported by the record) that it had already addressed the Eleventh Amendment issue on the merits in its earlier order denying WRI's motion to dismiss. (A-57-58.) WRI timely appealed the District Court order denying WRI's motion for summary judgment.[5]

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California's action was also in direct derogation of one of the oldest principles of receivership, recognized equally by the state and federal courts of Connecticut *and California*, which is that a receivership cannot be sued without the permission of the appointing court. (See California Code of Civil Procedure, section 568 and *Vitug v. Griffin* (1989) 214 Cal.App.3d 488, 493; *Washington Alaska Bank v. Dexter Horton Nat. Bank*, 263 F. 304; (9th Cir.1920); *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 852 (2d Cir.1962); *Hartford Fed. S&L Assn. v. Tucker*, 196 Conn. 172, 178, 491 A.2d 1084 (Conn.1984); *FDIC v. J.D.L. Assocs.*, 866 F. Supp. 76, 77-78 (D.Conn.1994) *Barton v. Barbour*, 104 U.S. 126, 128-129 (1881).)

[5] Shortly after filing its original complaint, California moved for partial summary judgment on issues of liability and entitlement to injunctive relief against Campbell and Tackman in their capacities as individuals, executors and trustees. The Court granted the motion as to Campbell and Tackman in their capacity as executors and trustees on August 5, 1993, and Campbell and Tackman timely appealed the ruling. (Ninth Circuit Docket Number 93-16754.)

## F. The Ninth Circuit Decision

On March 9, 1998, the Ninth Circuit Court of Appeals issued two published decisions in this action. In the related appeal by Campbell and Tackman, the Ninth Circuit affirmed the District Court's grant of partial summary judgment. (See A-3, fn.1.) The Court of Appeals also affirmed the District Court's denial of WRI's motion for summary judgment on the ground that the suit against WRI in its capacity as receiver is not a suit *"against"* WRI for purposes of Eleventh Amendment immunity:

> "[California's lawsuit] does not seek to recover Western Resources's assets, but rather the assets over which Western Resources is the receiver. California's lawsuit is therefore not 'against' Western Resources." (A-7-8.)[6]

The Court of Appeals denied WRI's petition for rehearing and suggestion for rehearing en banc on April 21, 1998. (A-59.)

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[6] Because the Court of Appeals ruled on an issue that neither party briefed, i.e. that California's suit against WRI was not "against" WRI for Eleventh Amendment purposes, the court did not address the issue that was briefed, which was whether WRI was an "arm" of the Connecticut Superior Court entitling WRI to Eleventh Amendment immunity.

## REASONS FOR GRANTING THE WRIT

### I. THE NINTH CIRCUIT COURT OF APPEALS ERRONEOUSLY FOUND THAT CALIFORNIA'S SUIT IS NOT "AGAINST" WRI FOR PURPOSES OF WRI'S ENTITLEMENT TO ELEVENTH IMMUNITY PROTECTION

#### A. The Court Of Appeals Erroneously Affirmed Denial Of WRI's Motion For Summary Judgment Because The Eleventh Amendment Bars California's Suit Against WRI For Lack Of Jurisdiction

The Ninth Circuit Court of Appeals erroneously affirmed the District Court's denial of WRI's motion for summary judgment because the Eleventh Amendment bars California's suit for lack of jurisdiction. The Eleventh Amendment bars "any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state . . . " (U.S. Const. amend. XI.) This immunity acts as an absolute jurisdictional bar wherever it applies. (*Quillen v. Oregon*, 127 F.3d 1136, 1138 (9th Cir.1997)), and bars pendant state causes of action as well as federal claims. (*Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 120-121 (1984).)

The undisputed facts before the District Court establish that WRI was appointed by the Connecticut Superior Court to act as receiver and administer all the assets of the Muscat testamentary trusts, that WRI's authority is narrowly prescribed and requires approval of the Superior Court for any action, and that the Superior Court continues to hold the trust assets in custodia legis. Because (as set forth below) these facts establish that the Eleventh Amendment bars California's suit against WRI

for lack of jurisdiction, the District Court erred in denying WRI's motion for summary judgment (*Anderson v. Creighton*, 483 U.S. 635, 641 (1987)) and the Ninth Circuit's decision affirming the District Court should be reversed. (See *International Paper Co. v. Ouellette*, 479 U.S. 481, 499-500 (1987).)

### B. The Eleventh Amendment Bars California's Suit Against WRI Regardless Of Whether California Can Enforce Judgment Against WRI's Own Assets

The Ninth Circuit's ruling that WRI's Eleventh Amendment immunity does not protect WRI from California's suit because WRI's own assets are (purportedly) not at risk is based upon an incorrect assumption, i.e., that California can recover from WRI "only in [WRI's] *representative capacity*." (A-7, citing *Excess and Casualty Reinsurance Ass'n v. Insurance Comm'r of Cal.*, 656 F.2d 491 (9th Cir.1981) and *Finkielstain v. Seidel*, 857 F.2d 893 (2d Cir.1988), italics in original.) In other words, the Court of Appeals assumes that, because WRI may not be required to satisfy a judgment against the trust assets from its own (i.e., WRI's) assets, the suit against WRI is not "against" WRI for purposes of Eleventh Amendment immunity.

The Court of Appeals' rationale ignores the fact that WRI is potentially subject to injunctive relief sought by California. Regardless of whether WRI may be liable on a judgment against the assets of the receivership, the Eleventh Amendment bars California's suit because it applies to non-monetary, *equitable* relief (such as the injunctive relief California seeks in this case) in addition to those for

monetary judgments. (*Cory v. White*, 457 U.S. 85, 90 (1982); *Missouri v. Fiske*, 290 U.S. 18, 25-27 (1933).) Permitting a plaintiff to avoid Eleventh Amendment immunity by claiming that the named defendant is not liable for monetary damages would be contrary to the scope and purpose ascribed to the Eleventh Amendment by this Court:

> "The Eleventh Amendment does not exist solely in order to prevent federal court judgments that must be paid out of the state's treasury . . . it also serves to avoid the indignity of subjecting a state to the coercive process of judicial tribunals . . . " (*Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996); see also *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994).)

The essence of the Eleventh Amendment, therefore, is to protect a state entity or actor from suit, not merely from money judgments. This rule has special relevance to WRI's situation as court-appointed receiver, because, in administrating the testamentary trusts which the Connecticut Superior Court now holds in custodia legis (*Walsh v. Raymond, supra*, 20 A. at 464), the Superior Court cannot act *except* through the agency of an individual or entity such as WRI. (*Worcester County Trust Company v. Riley*, 302 U.S. 292, 296 (1937).)

> "Since the proposed action is the performance of a duty imposed by the statute of the state upon state officials through whom alone the state can act, restraint of their action, which the bill of complaint prays, is restraint of state action, and the suit is in substance one against the state which the Eleventh Amendment forbids. (*Worcester County Trust, supra* at 299-300.)

This is exactly the situation in which WRI finds itself as the result of California's suit. WRI has been appointed by the Connecticut Superior Court to perform a duty, administering the assets of the Muscat testamentary trusts, which the Superior Court cannot do itself. WRI does not hold or possess the trust assets, which pursuant to Connecticut law are held in custodia legis by the Connecticut Superior Court.[7]

The Court of Appeals cites only distinguishable authority for the notion that a suit against a court-appointed receiver is not "against" the receiver for purposes of asserting Eleventh Amendment immunity. In *Excess and Casualty Reinsurance Ass'n v. Insurance Comm'r of California* (656 F.2d 491 (9th Cir.1981)), the Court based its decision in principal part on the fact that the plaintiff did *not* "seek to compel or forbid any action" by the state actor asserting immunity. (*Excess and Casualty Reinsurance, supra* at 497.) WRI's situation, in which it is subject to injunctive relief sought by California, is clearly distinguishable.

Similarly, in *Finkielstain v. Seidel* (857 F.2d 893 (2d Cir.1988)), the Court based its decision on the fact that the assets and liabilities of the entity placed in receivership had become the responsibility of the receiver. (*Finkielstain, supra*, at p. 896.) This distinguishes WRI's situation, in which the assets of the Muscat testamentary trusts are

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[7] Federal courts recognize the principle that a receiver merely manages receivership assets held in custodia legis by the appointing court under that court's supervision. (*Commonwealth Trust Co. of Pittsburgh v. Bradford*, 297 U.S. 613, 619 (1936); see also *F.D.I.C. v. Grella*, 553 F.2d 258, 261 (2d Cir.1977).)

held by the Connecticut Superior Court itself, in custodia legis. (*Walsh v. Raymond, supra,* 20 A. 464.)

Very simply, the issue of whether a WRI can be financially liable in its personal rather than "representative" capacity (the issue upon which the Ninth Circuit's decision hinged) is irrelevant because it is undisputed that California also seeks injunctive relief against WRI. The Court of Appeals cites no pertinent authority for the notion that suits against a court-appointed receiver are not "against" the receiver for purposes of Eleventh Amendment immunity.

## II. The Undisputed Facts Before The District Court Establish That The Eleventh Amendment Bars California's Suit Against WRI Because WRI Is Acting As An Arm Of The Connecticut Superior Court

California's suit against WRI cannot be permitted to proceed because the undisputed facts establish that WRI is acting as an "arm" of the Connecticut Superior Court, and, therefore, the District Court lacks jurisdiction as a matter of law. (*Pennhurst State School & Hospital v. Halderman, supra,* 465 U.S. at 120-121; *Quillen v. Oregon, supra,* 127 F.3d at 1138.)

It is settled that a state court, administered and funded in principal part by the state, is an "arm" of the state for purposes of asserting Eleventh Amendment immunity. (*Franceschi v. Schwartz,* 57 F.3d 828, 831 (9th Cir.1995); *Greater Los Angeles Council on Deafness, Inc. v. Zolin,* 812 F.2d 1103, 1110 (9th Cir.1987); *Landers Seed Co. v. Champaign National Bank,* 15 F.3d 729, 732 (7th Cir.1994); *Clark v. Clark,* 984 F.2d 272, 273 (8th Cir.1993), *cert. denied,*

510, U.S. 828 (1993).) In determining whether a court-appointed receiver, WRI, can assert Eleventh Amendment immunity, the Court should look to "the way state law treats the entity" and the extent to which the entity is controlled by the state. (*Mitchell v. Los Angeles Community College District*, 861 F.2d 828, 831 (9th Cir.1988), *cert. denied*, 490 U.S. 1081.)

In this case, settled Connecticut law states that court-appointed receivers are arms of the Superior Court. (*Walsh v. Raymond, supra*, 20 A. at 464; *Tucker v. American Insurance Co.*, 3 Conn.App. 397, 398, 488 A.2d 1278 (Conn.App.Ct.1985); *Parlato v. McCarthy*, 136 Conn. 126, 135, 69 A.2d 648 (Conn.1949.) A court receivership is created and controlled pursuant to rules established by the Connecticut Supreme Court. (Connecticut Rules of Court, Superior Court rules, Ch.18, section 485 et seq.) Connecticut statutes controlling receiverships also subject the receiver to the Superior Court's control. (Conn.Gen.Stat., sections 52-504, 52-508 (1994).)[8]

Under this authority, Connecticut considers court-appointed receivers to be an "arm" of the court. Summary judgment should therefore have been granted because the undisputed facts establish that WRI was appointed to act as receiver and administer the assets of the Muscat testamentary trusts pursuant to a Connecticut Superior Court order that narrowly prescribes WRI's

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[8] This is demonstrated also by the Connecticut Superior Court's own order, noted in footnote 4, *supra*, which forbids a) suit against the receiver, b) the receiver's substitution into any litigation, and c) holding the receiver liable for orders entered against the Muscat Trusts. (A-11-15.)

authority and requires Court approval of every action taken by WRI. (A-11-15.) The assets from the trusts are held by the Superior Court in custodia legis (*Walsh v. Raymond, supra,* 20 A. at 464), and WRI essentially administers Court assets under the Court's strict control.

This Court has ruled in the past that a state court "itself holds and administers [a receivership estate] through its receiver, as its officer . . . " (*Porter v. Sabin,* 149 U.S. 473, 479 (1893).) In its capacity as receiver for the assets of the Muscat testamentary trusts, WRI is acting as an "arm" of the Superior Court, and therefore entitled to the same Eleventh Immunity protection as that court. (*O'Connor v. State of Nevada,* 686 F.2d 749, 759 (9th Cir.1982); *Washington Legal Foundation v. Texas Equal Access to Justice Foundation,* 94 F.3d 996, 1005 (5th Cir.1996); *Monroe v. Horwitch,* 820 F.Supp. 682, 684 (D.Conn.1993) The District Court therefore erred in denying WRI's motion for summary judgment (*Anderson v. Creighton, supra,* 483 U.S. at 641), and the Ninth Circuit Court of Appeals erred in affirming the District Court decision. (See *International Paper Co. v. Ouellette, supra,* 479 U.S. at 499-500.)

## III. Certiorari Is Appropriate To Resolve This Important Federal Jurisdictional Issue

This Court should grant certiorari in this case because the Ninth Circuit's published decision states a jurisdictional rule which will have increasing importance. California's suit raises the issue of whether a state entity such as California can ignore a prior exercise of court jurisdiction over assets by another state. Lawsuits for

recovery of pollution remediation costs continue to increase in number and complexity, frequently involving numerous parties from multiple jurisdictions. (See, e.g., *In re: Texas Eastern Transmission Corp. PCB Contamination Ins. Coverage Litig.*, 15 F.3d 1230 (3d Cir.1994); *In re: Cayuhoga Equip. Corp.*, 980 F.2d 110 (2d Cir.1992); *Ins. Co. of North America v. Forty-Eight Insulations*, 633 F.2d 1212 (6th Cir.1980).) The issue presented in this petition will therefore grow in importance as suits which implicate assets over which a Court has taken control (in the contexts of bankruptcy, trust, intestacy, receiverships, etc.), grow in number. Review of the Ninth Circuit's decision, which was rendered on the basis of an interpretation of the word "against" that runs contrary both to Supreme Court authority and its own prior decisions, is therefore an appropriate exercise of this Court's supervisory powers.

## CONCLUSION

Western Resources, Inc. respectfully requests that this Court grants its petition for certiorari.

Dated: July 20, 1998

Respectfully submitted,

THOMAS H. CLARKE, JR.
SUSAN H. HANDELMAN
ROPERS, MAJESKI, KOHN & BENTLEY
*Counsel for Western Resources, Inc.*

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

| | |
|---|---|
| STATE OF CALIFORNIA, on behalf of the California Department of Toxic Substances Control,<br>*Plaintiff-Appellee,*<br>v.<br>ALBERT CAMPBELL, individually and as Trustee of the Victor Muscat Testamentary Trusts and Executor of the Estate of Victor Muscat; CHARLES TACKMAN, individually and as trustee of the Victor Muscat Testamentary Trusts and Executor of the Estate of Victor Muscat; ROBERT TIBERIIS, individually and as Trustee of the Victor Muscat Testamentary Trusts and Executor of the Estate of Victor Muscat; VIC, Inc., a New Jersey Corporation; CLAY McGOWAN; MIDDLETOWN MOULDING CO., a California Corporation; SIERRA PACIFIC INDUSTRIES, a California Corporation; FAY McGOWAN; GERALD RICHTER; LINDA RICHTER; TUPACK VERPACKUNGEN GESELLSCHAFT MBH,<br>*Defendants,* | No. 97-15308<br>D.C. No. CIV-S-93-00604GEB/JFM<br>OPINION |

and

CHICO CITY,

*Defendant-Appellee,*

v.

WESTERN RESOURCES, INC., Receiver of the Victor Muscat Testamentary Trusts,

*Defendant-Appellant.*

Appeal from the United States District Court
for the Eastern District of California
Garland E. Burrell, District Judge, Presiding

Argued and Submitted
December 9, 1997 – Pasedena, California

Filed March 9, 1998

Before: James R. Browning, Harry Pregerson, and Michael Daly Hawkins, Circuit Judges.

Opinion by Judge Pregerson

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**COUNSEL**

Thomas H. Clarke, Jr., Susan H. Handelman, Ropers, Majeski, John [sic] & Bentley, Redwood City, California, for defendant-appellant Western Resources, Inc.

Sandra Goldberg, Deputy Attorney General, Oakland, California, for plaintiff-appellee State of California, Department of Toxic Substance Control.

Dale C. Campbell, L. Burda Gilbert, Weintraub, Genshlea & Sproul, Sacramento, California, for defendants Albert Campbell and Charles Tackman, as Executors of the Estate of Victor Muscat.

Francis M. Goldsberry, III, Diepenbrock, Wulff, Plant & Hannegan, Sacramento, California, for defendant-appellee Chico City.

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## OPINION

PREGERSON, Circuit Judge:

This case arises from California's attempts to prompt the Defendants to clean up contamination caused by almost two decades of dumping hazardous chemicals onto the ground.[1] We must decide whether the Eleventh Amendment immunizes one of the defendants, Western Resources, from being sued in federal court because Western Resources is a receiver appointed by a Connecticut state court. We hold that the Eleventh Amendment does not immunize a receiver who is sued solely in its representative capacity.[2] We therefore affirm.

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[1] The factual background of this case is explained in more detail in a companion appeal filed by Albert Campbell and Charles Tackman, the appellant's codefendants. That companion appeal can be found at *California v. Campbell*, ___ F.3d ___ (9th Cir. 1998).

[2] We neither address nor decide whether the Eleventh Amendment immunizes court-appointed receivers who are sued for their own conduct.

I.

Victor Muscat owned Victor Industries, a manufacturing plant where workers disposed of hazardous chemicals by dumping them on the ground. After Muscat died, the State of California filed a complaint in federal court against the executors of Muscat's estate and the trustees of his testamentary trusts. The complaint, which asserted both federal and state law claims, sought to clean up the contamination and recover the money that California had spent responding to the contamination.

About two years after California filed its complaint in federal court, the Connecticut Superior Court, which had jurisdiction over Muscat's estate and trusts, removed the trustees at their request and appointed Western Resources as receiver over the trusts. Because the trustees were no longer responsible for Muscat's assets, the federal court in California substituted Western Resources into the federal action in place of the trustees.

Western Resources moved for summary judgment on the ground that it is immune under the Eleventh Amendment from being sued in federal court. Western Resources contended that, as a receiver appointed by the Connecticut court, it is an arm of the Connecticut court and therefore an arm of Connecticut itself. As an arm of Connecticut, Western Resources argued, it is entitled to Connecticut's Eleventh Amendment immunity. The district court denied Western Resources's motion, and Western Resources appealed.

II.

Generally, parties may not appeal district court orders before the entry of a final judgment. 28 U.S.C. § 1291. Denials of motions for summary judgment are therefore not usually immediately appealable. Nevertheless, under a narrow exception to this rule, parties may appeal from an interlocutory order if the order conclusively determines the issue in the trial court, resolves an important question independent of the subject matter of the litigation, and is effectively unreviewable on appeal from a final judgment. *Armendariz v. Penman*, 75 F.3d 1311, 1316 (9th Cir. 1996) (en banc) (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). We have applied this exception to cases in which Eleventh Amendment immunity was at issue "because the central benefit of immunity, the right not to stand trial in the first instance, is effectively lost if a case is erroneously permitted to proceed to trial." *Sofamor Danek Group, Inc. v. Brown*, 124 F.3d 1179, 1183 n.2 (9th Cir. 1997). This case falls within the exception. We therefore have jurisdiction over Western Resources's interlocutory appeal.

III.

We review de novo whether a party is immune under the Eleventh Amendment. *Id.*

IV.

The Eleventh Amendment provides that the jurisdiction of the federal courts "shall not be construed to

extend to any suit in law or equity, commenced or prosecuted against one of the United States." U.S. Const. amend. XI. "It has long been settled that the reference to actions 'against one of the United States' encompasses not only actions in which a State is actually named as the defendant, but also certain actions against state agents and state instrumentalities." *Regents of the Univ. of Cal. v. Doe*, ___ U.S. ___, 117 S.Ct. 900, 903 (1997).

Thus, to invoke the Eleventh Amendment, Western Resources must satisfy two requirements: it must show that California's lawsuit is "against" Western Resources *and* that Western Resources is an "arm" of Connecticut.

Both Western Resources and California discuss only the latter requirement. After addressing the relevant factors, California contends that Western Resources is not an arm of Connecticut and Western Resources contends that it is an arm of Connecticut.

To resolve this case, however, we need not get in the middle of this debate because Western Resources has not satisfied the threshold requirement for establishing Eleventh Amendment immunity. It has not shown that California's action is "against" a state or an arm of the state. *See* U.S. Const. amend. XI (granting states immunity from cases "*against* one of the United States" (emphasis added)).

Although Western Resources is named as a defendant in California's complaint, California's lawsuit is not *against* Western Resources; rather, it is against those who allegedly polluted the soil and groundwater at the manufacturing plant. California named Western Resources as a defendant because Western Resources is responsible for

the assets formerly owned by the alleged polluters. California cannot directly sue those responsible for the pollution because they no longer exist: Victor Muscat died, many of his assets were dispersed into trusts, and the trustees either died or quit.

These facts make all the difference. Cases that recognize an entity's Eleventh Amendment immunity are cases where the court is asked to determine the rights or liabilities *of that entity. See, e.g., Franceschi v. Schwartz,* 57 F.3d 828 (9th Cir. 1995) (determining whether municipal court commissioner violated civil rights laws); *Greater Los Angeles Council on Deafness, Inc. v. Zolin,* 812 F.2d 1103 (9th Cir. 1987) (determining whether court and jury commissioners were liable for not providing sign-language interpreters); *O'Connor v. Nevada,* 686 F.2d 749 (9th Cir. 1982) (determining whether State Bar of Nevada violated civil rights laws). Conversely, the Eleventh Amendment does not apply in cases where the entity invoking the immunity is sued only in its *representative capacity. See Excess and Casualty Reinsurance Ass'n v. Insurance Comm'r of Cal.,* 656 F.2d 491 (9th Cir. 1981) (holding that an action naming a state entity as a defendant did not constitute an action against the state because the state entity was sued in its capacity as receiver); *Finkielstain v. Seidel,* 857 F.2d 893 (2d Cir. 1988) (same).

Thus, the Eleventh Amendment only applies in cases where the courts are asked to determine the rights and liabilities of the entity invoking the immunity. California's lawsuit does not seek to determine Western Resources's rights and liabilities. It does not seek to recover Western Resources's assets, but rather the assets over which Western Resources is the receiver. California's

lawsuit is therefore not "against" Western Resources. Thus, even if Western Resources could show that it is an arm of Connecticut, it could not invoke the Eleventh Amendment to defeat California's action. We therefore affirm the decision below.

AFFIRMED.

DOCKET NO. CV-95-143287

| | | |
|---|---|---|
| HENRY W. PASCARELLA AS GARDIAN AD LITEM FOR THE UNBORN AND UNKNOWN HEIRS OF VICTOR MUSCAT, | ) | SUPERIOR COURT |
| Plaintiff | ) | JUDICIAL DISTRICT OF STAMFORD/ NORWALK AT STAMFORD |
| V. | ) | |
| ALBERT F. CAMPBELL, TRUSTEE, ALAN P. TACKMAN, EXECUTOR OF THE ESTATE OF CHARLES A. TACKMAN, TRUSTEE, MARJORIE TACKMAN, EXECTRIX OF THE ESTATE OF CHARLES A. TACKMAN, TRUSTEE, ROBERT D. TIBERIIS, TRUSTEE, | ) | FEBRUARY 14, 1995 |
| Defendants | ) | |

**ORDER APPOINTING PERMANENT RECEIVER**

The plaintiff's complaint for the appointment of a permanent receiver for the Trusts established by the Last Will and Testament of Victor Mustcat having come before the Court and a hearing thereon having herein held and upon further stipulation of the parties it is

Hereby Ordered:

1. That Western Resources, Inc., a Delaware Corporation with offices located at 120 Kisco Avenue, Mount Kisco, New York, is appointed permanent receiver of the Trusts.

2. That the permanent receiver shall be possessed of all lawful power and authority:

(A) To administer the Trusts;

(B) To defend and settle all claims against the Trusts;

(C) To assert and pursue all available claims and actions against persons or entities on behalf of the Trusts;

(D) To perform such other actions as the receiver may deem necessary to preserve and protect the property of the Trusts; and

(E) To take such other and further action as may be directed by the Court.

3. That the receiver shall be appointed and serve without bond.

Dated at Stamford, Connecticut
February 14, 1995

/s/ (s/ Karazin, J)
Judge of the Superior Court

No. CV 95 143287

| | | |
|---|---|---|
| HENRY W. PASCARELLA, AS GUARDIAN | ) | SUPERIOR COURT |
| V. | ) | JUDICIAL DISTRICT OF STAMFORD/NORWALK AT STAMFORD |
| ALBERT F. CAMPBELL, et al. | ) | APRIL 3, 1995 |

COURT'S AMENDED AND ADDITIONAL ORDERS RE RECEIVER

After consideration of the motion by the receiver, Western Resources, Inc., for advice and further orders and the receiver's first interim report, dated March 24, 1995, and after hearing the receiver on the issues in open court on April 3, 1995, it is

HEREBY ORDERED:

1. That should there be any conflict between the order of this Court entered February 14, 1995 with these orders, these orders shall prevail.

2. Western Resources, Inc. is reaffirmed as the permanent receiver for the Trusts established by the last will and testament of Victor Muscat [the Muscat Trusts]. It shall serve without bond.

3. This Court has not granted permission to anyone, including the State of California, to sue the receiver, to make any attempt to substitute the receiver as a party in any legal action or to attempt to hold the receiver liable for any orders entered against the Muscat Trusts.

4. The receiver shall make no payment to any beneficiary of the Muscat Trusts before August 31, 1995, without further order by this Court.

5. To the extent that the Muscat Trusts are presently parties in any actions in which the Muscat Trusts are seeking affirmative relief or affirmatively pursuing an appeal, the receiver is permitted to take the minimal steps necessary to avoid dismissal of any such claims or appeals. The receiver is ordered to make a recommendation to this Court by June 15, 1995 regarding what further efforts, if any, should be taken to pursue such claims and appeals.

6. The receiver is permitted to retain the law firm of Heller Ehrman White & McAuliffe to represent it, to the extent necessary, to protect the receiver's interests in litigation in California. The receiver shall direct that firm not to take positions inconsistent with the orders of this Court.

7. The receiver is permitted to pay Heller Ehrman White & McAuliffe the reasonable value for legal fees and expenses rendered to the Muscat Trusts, not to exceed $117,000.

8. The receiver is permitted to make payment to Heller Ehrman White & McAuliffe for its reasonable fees and expenses to be rendered as counsel to the receiver, but not in excess of $30,000 without further approval of this Court.

9. The receiver is permitted to pay to Brown & Caldwell the reasonable value of the cost of services

provided to the Muscat Trusts, relating to clean-up operations on properties located in Chico, California, but not in excess of $150,000, without further order of this Court.

10. The receiver is permitted to retain Brown & Caldwell to provide additional clean-up services to the receiver, but not in excess of an additional $100,000, without permission of this Court.

11. By June 15, 1995, the receiver shall make further recommendation to this Court regarding the retention of Brown & Caldwell to provide services to the receiver.

12. The receiver is directed to pay to the plaintiff, Henry W. Pascarella, as guardian ad litem for the unborn and unknown heirs of Victor Muscat, the amount of $13,904.03 for legal fees and expenses incurred by him in instituting this action.

13. The receiver's retention of David Greenberg, Esquire and the law firm of Tyler Cooper & Alcorn to provide legal services to it is affirmed, and the receiver is granted permission to pay to them the reasonable costs of their services and expenses, limited to $60,000 without further order of this Court.

14. The receiver is permitted to retain Dames & Moore to provide it expert services regaridng environmental issues and to pay to it the reasonable value of its services, not to exceed $30,000 without further order of this Court.

15. The receiver is permitted to pay itself for its reasonable time, at $150 per hour, and expenses incurred as receiver, not to exceed $40,000 without further order of this Court.

16. [The receiver withdrew a proposed order 16 during the hearing on April 3, 1995, pending resolution of issues between the receiver and counsel for the former trustees.]

17. No appraisers shall be appointed at this time.

18. The receiver shall file a sworn inventory of the assets of the estate by no later than June 15, 1995, subject to further order of this Court.

19. By June 15, 1995, the receiver shall make recommendations to this Court regarding an appropriate time to be set for the presentation of claims against the receivership estate.

20. By June 15, 1995, the receiver shall make a recommendation to this Court regarding whether the Muscat Trusts are insolvent.

21. The first semi-annual report of the receiver, required by Practice Book §§ 498 and 499 shall be due on the first Tuesday of October, 1995.

22. By June 15, 1995, the receiver shall file recommendations to this Court regarding steps which the receiver believes should be taken to maximize the assets of this receivership estate for the benefit of all parties.

23. Except as specifically set out in these orders, the receiver shall not defend or settle any claim against the Muscat Trusts without prior approval of this Court.

24. Exept as otherwise specifically stated in this order, the receiver shall not settle any claim which it could assert against persons or entities, without prior permission of the Court.

25. The receiver shall exercise its discretion whether to pursue efforts to obtain a refund of certain federal taxes paid by the Muscat Trusts as Contributions in Aid of Construction regarding the construction of water lines in California. The receiver is permitted to expend up to $20,000 in legal fees, without further order of this Court, for any such effort. This amount for legal fees is in addition to amounts approved for legal fees contained elsewhere in these orders.

Dated at Stamford, Connecticut
April 5, 1995

/s/ D'Andrea, J
Judge of the Superior Court
(D'ANDREA, J)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| STATE OF CALIFORNIA, on behalf of the California Department of Toxic Substances Control,<br><br>Plaintiffs,<br><br>v.<br><br>ALBERT CAMPBELL, Individually and as Trustee of the VICTOR MUSCAT TESTAMENTARY TRUSTS and Executor of the ESTATE OF VICTOR MUSCAT; ROBERT TIBERIIS, Individually and as Trustee of the VICTOR MUSCAT TESTAMENTARY TRUSTS and Executor of the ESTATE OF VICTOR MUSCAT; MARJORIE TACKMAN and ALAN TACKMAN, Personal Representatives of the Estate of CHARLES TACKMAN; VIC Inc., a New Jersey corporation; TUPACK VERPACKUNGEN GESELLSCHAFT M.B.H., an Austrian corporation: CLAY MCGOWAN, an individual; FAYE MCGOWAN, an individual; the CITY OF CHICO: MIDDLETON MOULDING CO., a California Corporation; and SIERRA PACIFIC INDUSTRIES, a California corporation,<br><br>Defendants. | NO. CIV-S-93 604 GEB JFM<br><br>[Proposed] ORDER<br><br>(Filed Mar. 19, 1996) |

IT IS HEREBY ORDERED that:

1. All pretrial and trial dates set in the Status (Pretrial Scheduling) Order dated February 7, 1995 and the Stipulation Extending Dates For Identification of Expert Witnesses dated October 17, 1995, are vacated.

2. Western Resources, Inc., as the receiver of the Victor Muscat Testamentary Trusts, is substituted as a party in this action in the place of Albert Campbell and Robert Tiberiis, in their capacities as Trustees of the Victor Muscat Testamentary Trusts ("the Trustees"), with respect to all claims filed by or against the Trustees; all responsive pleadings filed by the Trustees; and all discovery responses served by the Trustees. Western Resources, Inc., as the receiver of the Victor Muscat Testamentary Trusts, is also substituted for the Trustees in all orders issued by the Court in this action, including the Order issued against the Trustees on August 5, 1993.

3. Counsel for the plaintiff is directed to serve by mail a copy of this Order on the counsel for Western Resources, Inc., Mr. David W. Schneider, Tyler, Cooper & Alcorn, New Haven, Connecticut. Western Resources, Inc. is directed to file with this Court no later than April 12, 1996, a notice identifying the name and address of the attorney who will represent it in this action.

4. Plaintiff is authorized to file an amended complaint to add claims against Gerald and Linda Richter, current owners of the Chico Airport Site who have not previously been named as defendants. All other parties are authorized to file crossclaims and/or counterclaims

against these new defendants and Gerald and Linda Richter may file cross-complaints and/or counterclaims.

**IT IS SO ORDERED.**

Dated: March 11, 1996

/s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR.
Judge, United States District Court

THOMAS H. CLARKE, JR. SB# 47592
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Attorneys for WESTERN RESOURCES, INC.

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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| STATE OF CALIFORNIA, on behalf of the California Department of Toxic Substances Control,<br><br>Plaintiffs,<br><br>v.<br><br>ALBERT CAMPBELL, individually and as Executor of the ESTATE OF VICTOR MUSCAT; ROBERT TIBERIIS, individually and as Executor of the ESTATE OF VICTOR MUSCAT; WESTERN RESOURCES, INC., As Receiver of the VICTOR MUSCAT TESTAMENTARY TRUSTS; MARJORIE TACKMAN and ALAN TACKMAN, | Case No. CIV-S-93-604-GEB-JFM<br><br>**WESTERN RESOURCES, INC.'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT (PURSUANT TO FRCP RULE 56); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; STATEMENT OF UNDISPUTED FACTS (PURSUANT TO LOCAL RULE 260); DECLARATION OF THOMAS H. CLARKE, JR. IN SUPPORT THEREOF; REQUEST FOR JUDICIAL NOTICE; PROPOSED ORDER** |

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|---|---|
| Personal Representatives of the ESTATE OF CHARLES TACKMAN; VIC, INC., a New Jersey corporation; TUPACK VERPACKUNGEN GESELLSCHAFT M.B.H., an Austrian corporation; CLAY McGOWAN, an individual; FAYE McGOWAN, an individual; the CITY OF CHICO; MIDDLETON MOULDING CO., a California Corporation; SIERRA PACIFIC INDUSTRIES, a California corporation; GERALD RICHTER and LINDA RICHTER,<br><br>Defendants.<br><br>AND RELATED CROSS-CLAIMS AND THIRD PARTY COMPLAINTS | (Filed Sep. 26, 1996)<br>**DATE:**<br>**November 18, 1996**<br>**TIME: 9:00 a.m.**<br>**PLASCE [sic]:**<br>**Courtroom 6**<br>**THE HONORABLE GARLAND ELLIS BURRELL, JR.**<br>**TRIAL DATE:** |

**TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:**

PLEASE TAKE NOTICE that on November 18, 1996, at 9:00 a.m., in Courtroom No. 6, of the above-entitled court, located at 650 Capitol Mall, Sacramento, California, there will be a hearing on the Motion for Summary Judgment filed by WESTERN RESOURCES, INC. (hereinafter

"WRI"). WRI will move the Court for an order granting summary judgment of the following:

**AS TO THE 20th STREET SITE**

Issue 1. Eleventh Amendment immunity Bars Plaintiff's CERCLA Section 107 cause of action against WRI, a court-appointed receiver. (See WRI'S Statement of Undisputed Facts, Facts 1 - 11.)

Issue 2. Eleventh Amendment immunity bars Plaintiff's Health and Safety Code Section 25358.3 cause of action against WRI, a court-appointed receiver. (See WRI'S Statement of Undisputed Facts, Facts 12 - 22.)

Issue 3. Eleventh Amendment immunity bars Plaintiff's abatement of nuisance cause of action against WRI, a court-appointed receiver. (See WRI'S Statement of Undisputed Facts, Facts 23 -33.)

**AS TO THE AIRPORT SITE**

Issue 1. Eleventh Amendment immunity Bars Plaintiff's CERCLA Section 107 cause of action against WRI, a court-appointed receiver. (See WRI'S Statement of Undisputed Facts, Facts 34 - 44.)

Issue 2. Eleventh Amendment immunity bars Plaintiff's Health and Safety Code Section 25358.3 cause of action against WRI, a court-appointed receiver. (See WRI'S Statement of Undisputed Facts, Facts 45 - 55.)

Issue 3. Eleventh Amendment immunity bars Plaintiff's public nuisance cause of action against WRI, a court-appointed receiver. (See WRI'S Statement of Undisputed Facts, Facts 56 - 66.)

This Motion is based upon the grounds set forth in Federal Rules of Civil Procedure Rule 56, upon the Memorandum of Points and Authorities attached hereto, the Statement of Undisputed Material Facts, the Declaration of Thomas H. Clarke, Jr. in Support of the Motion for Summary Judgment, the Request for Judicial Notice, the complete files and records herein, and other such oral and documentary evidence which may be produced at the hearing of this motion.

DATED: September 24, 1996

ROPERS, MAJESKI,
KOHN & BENTLEY

By /s/ Thomas H. Clarke
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Attorneys for Defendant
WESTERN RESOURCES, INC.

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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|---|---|
| STATE OF CALIFORNIA, on behalf of the California Department of Toxic Substances Control,<br><br>Plaintiffs,<br><br>v.<br><br>ALBERT CAMPBELL, individually and as Executor of the ESTATE OF VICTOR MUSCAT; ROBERT TIBERIIS, individually and as Executor of the ESTATE OF VICTOR MUSCAT; WESTERN RESOURCES, INC., as Receiver of the Assets of the VICTOR MUSCAT TESTAMENTARY TRUSTS; MARJORIE TACKMAN and ALAN TACKMAN, Personal Representatives of the Estate of CHARLES TACKMAN; VIC INC., a New Jersey corporation; TUPACK VERPACKUNGEN GESELLSCHAFT M.B.H., an Austrian corporation; CLAY McGOWAN, an individual; | **CASE NO. CIV-S-93-604 GEB-JFM**<br><br>**WESTERN RESOURCES, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT (F.R.C.P. RULE 56)**<br><br>**(Filed Sep. 26, 1996)** |

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| FAYE McGOWAN, an individual; the CITY OF CHICO; MIDDLETON MOULDING CO., a California Corporation; SIERRA PACIFIC INDUSTRIES, a California corporation; GERALD RICHTER and LINDA RICHTER,<br><br>Defendants.<br><br>AND RELATED CROSS-CLAIMS AND THIRD PARTY COMPLAINTS | **DATE: November 18, 1996**<br>**TIME: 9:00 a.m.**<br>**PLACE: Courtroom 6**<br>**THE HONORABLE GARLAND ELLIS BURRELL, JR.**<br><br>**TRIAL DATE:** |

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WESTERN RESOURCES, INC. (hereinafter "WRI") respectfully submits the following Memorandum of Points and Authorities in Support of Its Motion For Summary Judgment (hereinafter "Motion").

## I.

## SUMMARY OF ARGUMENT

By this Motion, WRI respectfully requests that the Court dismiss WRI with prejudice from this action in its entirety because WRI, as an officer of the Connecticut Superior Court, is protected by Eleventh Amendment immunity and therefore plaintiff's causes of action against WRI in the suit presently before this Court are barred as a matter of law.

First, neither CERCLA nor the state law upon which plaintiff's claims are based abrogate the State of Connecticut's Eleventh Amendment immunity from suit for such claims. Second, WRI, as a judicial officer of the Connecticut Superior court is an *arm of the State* of Connecticut and is protected by Connecticut's Eleventh Amendment immunity. Third, the state-versus-state exception to Eleventh Amendment immunity does not apply because the strict requirements for this exception are not met in this case. WRI, as a judicial officer of the State of Connecticut, is therefore protected by Eleventh Amendment immunity as a matter of law, and plaintiff's suit against WRI must be dismissed with prejudice.

## II.

## FACTUAL AND PROCEDURAL BACKGROUND

Victor Muscat ("MUSCAT") died in 1975 and his Last Will and Testament named ALBERT CAMPBELL ("CAMPBELL"), ROBERT TIBERIIS ("TIBERIIS"), AND CHARLES TACKMAN ("TACKMAN") as both executors of the Estate of Victor Muscat ("Estate") and as trustees of the five Victor Muscat Testamentary Trusts ("Muscat Trust"). (Exhibit "C", page 2, attached to Request for Judicial Notice (hereinafter "RJN").) Plaintiff alleges that at the time of MUSCAT's death, he owned an interest in a can and tube manufacturing business referred to by plaintiff as Victor Industries Corporation. (Exhibit "A" to the Declaration of Thomas H. Clarke, Jr. (hereinafter "Declaration"), ¶ 14, 15.) Plaintiff further alleges that Victor Industries was initially located at the Chico Municipal Airport, Chico, California ("Airport Site") but later moved to 20th Street, Chico, California ("20th Street Site") several years before MUSCAT's death. (Exhibit "A" to Declaration. ¶ 13, 14.) Plaintiff also alleges that MUSCAT had an ownership interest in the real property which comprised the 20th Street Site. (Exhibit "A" to Declaration, ¶ 15.)

Plaintiff next alleges that, pursuant to a provision of MUSCAT's will, the Muscat Trust, the Muscat Estate, CAMPBELL, TACKMAN and/or TIBERIIS became owners of the property at the 20th Street Site and of the shares of Victor Industries. (Exhibit "A" to Declaration, ¶ 16-18.) Plaintiff also alleges that the business continued to operate at the 20th Street Site and was later sold to VIC, Inc. in 1984. (Exhibit "A" to Declaration, ¶ 19, 20.)

This action was initially brought in April, 1993 by the STATE OF CALIFORNIA ("STATE") against CAMPBELL and TACKMAN, in their capacities as individuals, as executors of the Estate, and as trustees of the Muscat Trusts, seeking (a) CERCLA cost recovery, and (b) injunctive relief based on state law claims, including abatement of nuisance. (Exhibit "A" to Declaration, ¶¶ 10, 11, 13, 14, 15, 16.) All of the STATE's causes of action were based on alleged soil and ground-water contamination at the 20th Street and Airport Sites. (Exhibit "A" to Declaration, ¶¶ 13, 14, 19, 28, 30.)

In June, 1993, the STATE brought a motion for partial summary judgment regarding the 20th Street Site claims only, seeking a judgment of liability and injunctive relief against CAMPBELL and TACKMAN, in their capacities as individuals, executors, and trustees. (Exhibit "F" to Declaration.) The partial summary judgment motion and request for injunctive relief was granted in August, 1993 as to CAMPBELL and TACKMAN, in their capacities as executors and as trustees. (Exhibit "G" to Declaration.) This ruling was appealed by CAMPBELL and TACKMAN in September, 1993.[1] (Exhibit "H" to Declaration.) After the 1993 partial summary judgment, the STATE amended its complaint and added TIBERIIS, among others, as a defendant in his former capacity as executor of the Estate and as trustee of the Muscat Trusts, and, because of TACKMAN's death, the representatives of TACKMAN's estate were substituted in as defendants in his stead. (Exhibit "A" to Declaration, ¶ 5, 6.)

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[1] The appeal is currently before the United States Court of Appeals for the Ninth Circuit.

On February 14, 1995, the Connecticut Superior Court for the Judicial District of Stamford/Norwalk, upon the application of the guardian for unascertained heirs, appointed WRI as a receiver for the Muscat Trusts, and removed the trustees per a prior order of the Greenwich (Connecticut) Probate Court. (Exhibit "A" to RJN.) The Muscat Trusts still exist, but are only shells with no trustees or assets because the assets are now held in custodia legis by the Connecticut Superior Court as guardian.[2] The Connecticut Superior Court held that the State of California did not have permission to sue the receiver. (Exhibit "B" to RJN, ¶ 3.) On March 11, 1996, however, this Court ordered that the Connecticut Superior Court's receiver, WRI, be substituted in the place of CAMPBELL and TIBERIIS in their capacities as trustees only. (Exhibit "C" to Declaration.) This substitution was involuntary and done without notice or an opportunity to be heard.

WRI then filed a Motion to Dismiss and Alternative Motions on April 8, 1996 on numerous bases. (Exhibit "I"

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[2] A Connecticut trust does not fail for lack of a trustee. *Babcock, et al. v. African Methodist Episcopal Zion Soc. of Hartford, et al.*, 103 A. 665, 667 (S.Ct. Conn. 1918). (Exhibit "G" to RJN.) In a Connecticut receivership, the state court itself holds the property as guardian. *Walsh v. Raymond*, 20 A. 464, 464 (S.Ct. Conn. 1889). (Exhibit "F" to RJN.) It should be noted that although previous briefs filed by Plaintiff in this matter have cited California Probate Code, the controlling law on the estate and trust issues in this case is Connecticut law because these entities are within the control and jurisdiction of the State of Connecticut Probate Courts.

to Declaration.) This Court denied WRI's Motion to Dismiss at oral hearing on May 28, 1996[3]. (Exhibit "D" to Declaration.) During oral argument on WRI's Motion to Dismiss, the Court stated that WRI had not raised the issue of Eleventh Amendment immunity in its moving papers, but had done so only in its reply papers, and that the issue was therefore not properly before the Court. (Exhibit "D", pages 5:4-6:2 to Declaration.)

The currently controlling case on the issue of Eleventh Amendment immunity, *Seminole Tribe of Florida v. Florida,* was decided by the United States Supreme Court less than two weeks prior to WRI's filing of its Motion to Dismiss. *Seminole Tribe of Florida v. Florida,* 116 S.Ct. 1114, 1996 U.S. LEXIS 2165 (1996)[4]. The Eleventh Amendment defense is in the nature of a jurisdictional bar. *Alabama v. Pugh,* 438 U.S. 781, fn. 1 at 782 (1978); *Edelman v. Jordan,* 415 U.S. 651, 677 (1974). Pursuant to Eleventh Amendment immunity, Plaintiff's causes of action against WRI are barred and should be dismissed with prejudice. WRI now submits this Motion solely to address Eleventh Amendment immunity as it applies to WRI as a state court appointed receiver being sued in its official capacity.

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[3] The Court's tentative decision at the hearing was confirmed in its Order of May, 31, 1996. (Exhibit "E" to the Declaration.).

[4] All cites to this case are to the LEXIS pagination.

## III.

## STANDARD FOR SUMMARY JUDGMENT

If the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, the moving party is entitled to judgment as a matter of law. Federal Rules of Civil Procedure, Rule 56(c). Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). A complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. *Id.* at 322-323. One of the principle purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. *Id.* at 323.

In order to defeat a motion for summary judgment, the non-moving party must present "significant probative evidence tending to support the complaint." *White v. Roper*, (9th Cir. 1990) 901 F.2d 1501, 1503. If the evidence presented in opposition to a motion for summary judgment is merely colorable, or is not significantly probative, summary judgment may properly be granted. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

Here, Plaintiff has not and cannot establish any material facts demonstrating that WRI, a receiver appointed by a Connecticut Superior Court, is not entitled to Eleventh Amendment immunity. *Material* facts are those

which, under applicable substantive law, may effect the outcome of the case. *Anderson* 477 U.S., at 248. In the instant case, there is no dispute as to the material facts regarding WRI's status as a state court appointed receiver, therefore, WRI is entitled as a matter of law to summary judgment because it is fully entitled to Eleventh Amendment immunity from this action.

## IV.

## ARGUMENT

WRI, as the receiver of the assets of the Muscat Trusts, appointed by a Connecticut Superior Court, is an *arm of the state*[5] of Connecticut and is therefore entitled to Eleventh Amendment immunity. Furthermore, the instant action does not fall within the narrow exception to Eleventh Amendment immunity for actions by one state directly against another state. For these reasons, the instant action brought by Plaintiff cannot be maintained and WRI should be dismissed with prejudice from the action.

### A. WRI, As A Connecticut Superior Court Appointed Receiver, And Therefore An Arm Of The State, Is Entitled To Eleventh Amendment Immunity From Plaintiff's Action

WRI is a state court appointed receiver and therefore, as an *arm of the state*, WRI is entitled to Eleventh

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[5] "A receiver is uniformly regarded as an officer of the court." *Walsh, supra,* at 464. (Exhibit "F" to RJN.)

Amendment immunity from the claims brought by Plaintiff in the instant action because Congress did not abrogate Eleventh Amendment immunity when it enacted CERCLA, because state law claims cannot abrogate such immunity, and because Connecticut has not waived its right to such immunity.

**1. CERCLA Does Not Abrogate Connecticut's Eleventh Amendment Immunity From Suit For CERCLA Causes Of Action**

When Congress enacted CERCLA it did not, and could not, have abrogated the state's Eleventh Amendment immunity from suit for CERCLA related causes of action. The power to abrogate said immunity only exists when Congress acts pursuant to the Fourteenth Amendment, and because CERCLA was enacted pursuant to the Interstate Commerce Clause there was not, and cannot be, an abrogation of said immunity.

In a critical and decisive opinion, the United States Supreme Court recently decided *Seminole Tribe of Florida v. Florida,* in which the Court clarified and defined the ability of Congress to abrogate the States' right to Eleventh Amendment immunity. *Seminole Tribe of Florida v. Florida,* 116 S.Ct. 1114, 1996 U.S. LEXIS 2165 (1996). The central issue in *Seminole* was whether the Seminole Tribe of Florida could sue the State of Florida under the Indian Gaming Regulatory Act, which was enacted by Congress pursuant to the Indian Commerce Clause. The Court held that the State of Florida could not be sued under the Indian Gaming Regulatory Act because Congress did not have the power to abrogate the rights of the States to

Eleventh Amendment immunity under either the Interstate Commerce Clause or the Indian Commerce Clause. *Seminole,* 1996 U.S. LEXIS 2165, at *20-47.

After a review of the literal language of the Eleventh Amendment, the Court stated that "we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms. . . . That presupposition has two parts: first that each state is a sovereign entity in our federal system; and second, that it is inherent in the nature of sovereignty not to be amendable to the suit of an individual without its consent." *Seminole,* 1996 U.S. LEXIS 2165, at *16 (citations omitted). The Court further explained that "[f]or over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States was not contemplated by the Constitution when establishing the judicial power of the United States." *Seminole,* 1996 U.S. LEXIS 2165, at *16 (citations omitted).

In addressing the issue of whether Congress had abrogated the States' immunity from suit, the Court stated that "we ask two questions: first, whether Congress has unequivocally expressed its intent to abrogate the immunity, . . . and second, whether Congress has acted pursuant to a valid exercise of power." *Seminole,* 1996 U.S. LEXIS 2165, at *17 (citations omitted). After finding that Congress had expressed a clear legislative intent to abrogate the States' Eleventh Amendment immunity when enacting the Indian Gaming Regulatory Act, the Court turned to the critical issue of whether Congress had the power to abrogate the State's immunity under the Act. *Seminole,* 1996 U.S. LEXIS 2165, at *21.

The Court noted that it had previously upheld abrogation of Eleventh Amendment immunity under only two provisions of the Constitution, the Fourteenth Amendment and the Interstate Commerce Clause. *Seminole*, 1996 U.S. LEXIS 2165, at *24. The Court found that the only case in which abrogation under the Commerce Clause was upheld was the recent Supreme Court plurality decision of *Pennsylvania v. Union Gas Co.*, in which the Court held that Congress had abrogated the States' Eleventh Amendment immunity when it enacted CERCLA pursuant to the Commerce Clause. *Seminole*, 1996 U.S. LEXIS 2165, at *24-25, citing *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), (*Union Gas* is overruled by the *Seminole* decision, as discussed below). The Court noted that the Indian Commerce Clause constituted a greater transfer of power from the States to the Federal Government than the Interstate Commerce Clause, and therefore the decision in *Union Gas*, if followed, would provide for the power for abrogation of Eleventh Amendment immunity in the enactment of the Indian Gaming Regulatory Act. *Seminole*, 1996 U.S. LEXIS 2165, at *29. The Court then turned its focus to an analysis of the questionable conclusion in *Union Gas*.

The Court found that "the Court in *Union Gas* had reached a result without an express rationale agreed upon by a majority of the Court," and that "[s]ince it was issued, *Union Gas* has created confusion among the lower courts that have sought to understand and apply the deeply fractured decision." *Seminole*, 1996 U.S. LEXIS 2165, at *32. the Court also recognized that "never before the decision in *Union Gas* had we suggested that the bounds of Article III could be expanded by Congress

operating pursuant to any constitutional provision other that the Fourteenth Amendment." *Seminole*, 1996 U.S. LEXIS 2165, at *34. The Court stated that "in the five years since it was decided, *Union Gas* has proven to be a solitary departure from established law," and that "[r]econsidering the decision in *Union Gas*, we conclude that none of the policies underlying stare decisis require our continuing adherence to its holding." *Seminole*, 1996 U.S. LEXIS 2165, at *36 (citations omitted). Finally, the Court stated that "[w]e feel bound to conclude that *Union Gas* was wrongly decided and that it should be, and now is, overruled." *Seminole*, 1996 U.S. LEXIS 2165, at *37. The Court explained that "the Eleventh Amendment restricts the judicial power under Article III, and Article I [e.g., the Interstate Commerce Clause] cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Seminole*, 1996 U.S. LEXIS 2165, at *47 (comment added). The Court then held that the Seminole Tribe's suit against the State of Florida must be dismissed for lack of jurisdiction. *Seminole*, 1996 U.S. LEXIS 2165, at *47.

The decision in *Seminole Tribe* expressly overruled the *Union Gas* decision and therefore Congress did not, and could not, have abrogated the States' Eleventh Amendment immunity when Congress enacted CERCLA pursuant to the Interstate Commerce Clause. A state may consent to suit against it in federal court, but the Supreme Court has insisted that such consent be unequivocally expressed. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 99 (1984). Therefore, a State may not be sued pursuant to the causes of actions provided for in

CERCLA without that State's express consent, and Connecticut has not expressly consented to be sued for such actions.

### 2. State Law Causes of Action Cannot Abrogate Connecticut's Eleventh Amendment Immunity

As noted above, only Congress can abrogate the Eleventh Amendment pursuant to the Fourteenth Amendment. Therefore, when addressing state common law and state statutory causes of action brought in Federal Court pursuant to 28 U.S.C. § 1367, such as those brought by Plaintiff in the instant case, there is not even the pretense of a valid abrogation of a state's Eleventh Amendment immunity. The Supreme Court has made it very clear that the Eleventh Amendment's bar applies to pendant state law claims as well as federal claims. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 120-21 (1984). As mentioned above, there is no indication that Connecticut has expressly consented to be sued for any of the causes of action brought by Plaintiff. In fact, the Connecticut Superior Court has explicitly forbidden such a suit against the receiver, WRI. (Exhibit "B" to RJN, ¶ 3.)[6]

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[6] It is questionable whether a state court can waive the state's Eleventh Amendment immunity; state legislative action is usually required for such waiver. In Connecticut, a claims commissioner provides for the authorization of actions against the state, thereby waiving the state's immunity. (Exhibit "K" to RJN.)

### 3. WRI, As A Receiver Appointed By The Superior Court Of The State Of Connecticut, Is Protected By Eleventh Amendment Immunity

A state court is viewed as an arm of the State for Eleventh Amendment immunity purposes, and such immunity also extends to officers and agents of the state court. WRI, as a state court appointed receiver, is an officer and agent of the court and therefore, as an arm of the state court, WRI is fully entitled to Eleventh Amendment immunity from the instant action.

#### a. The Connecticut Superior Court is an *arm of the State* of Connecticut and is protected by Eleventh Amendment Immunity

State courts, ranging from municipal courts to state supreme courts, are considered *arms of the state*, and are therefore, provided with Eleventh Amendment immunity. In addressing this issue as it applies to municipal courts, the Ninth Circuit Court of Appeals has held that a municipal court is an arm of the state and is therefore protected from suit by Eleventh Amendment immunity. *Franceschi v. Schwartz*, 57 F.3d 828, 831 (9th Cir. 1995). The Ninth Circuit based its holding on the general rule that the Eleventh Amendment bars suits not only against the state but also against an arm of the state. *Franceschi*, 57 F.3d, at 831. The Ninth Circuit has also held that "a suit against the Superior Court is a suit against the State, barred by the Eleventh Amendment." *Greater Los Angeles Council on Deafness v. Zolin*, 812 F.2d 1103, 1110 (9th Cir. 1987).

Other Circuits have also held that State courts are protected by Eleventh Amendment immunity. *Landers*

*Seed Co. v. Champaign National Bank*, 15 F.3d 729, 732 (7th Cir. 1994) (Illinois Supreme Court protected by Eleventh Amendment immunity); *Clark v. Clark*, 984 F.2d 272, 273 (8th Cir. 1993) (Supreme Court of Iowa protected by Eleventh Amendment immunity), *reh'g, en banc, denied*, 1993 U.S. App. LEXIS 6047 (8th Cir. 1993), *cert. denied*, 510 U.S. 828 (1993). Like the courts in these decisions, the Connecticut Superior Court is an arm of the state of Connecticut and is cloaked with Eleventh Amendment immunity.

**b. Officers and agents of state courts are *arms of the state courts* and are therefore entitled to Eleventh Amendment immunity**

Not only are state courts themselves protected by Eleventh Amendment immunity as *arms of the state*, but such immunity also applies to officers and agents of the state courts when acting as *arms of the court*. *O'Connor v. State of Nevada*, 868 F.2d 749, 750 (9th Cir. 1982) (State Bar of Nevada is an arm of the Supreme Court of Nevada and is therefore immune from suit in federal court under the Eleventh Amendment); *Monroe v. Horwitch*, 820 F.Supp. 682, 684 (D.Conn. 1993) (Statewide Grievance Committee for State Bar is an arm of the state court and therefore enjoys the same Eleventh Amendment immunity that the court does); *Washington Legal Foundation v. Texas Equal Access to Justice Foundation*, 873 F.Supp. 1, 10-11 (W.D. Texas 1995) (foundation created by order of the Texas Supreme Court and acting pursuant to that Court's authority is an arm of that Court and is therefore entitled to Eleventh Amendment immunity from suit in federal court).

The breadth of Eleventh Amendment immunity not only protects committees and foundations which are created and controlled by the highest state courts, but it also extends to protect clerks of the State's court. *Davis v. State of New York, et al.*, 1991 U.S. Dist. LEXIS 10808, *6 (S.D.N.Y. 1991) (Administrator/clerk could not be sued in official capacity because Eleventh Amendment prohibits suits in a federal court against a state or an instrumentality of a state); *Curry v. Pucinski*, 1994 U.S. Dist. LEXIS 12532, *1 (N.D. Ill. 1994) (clerk of Circuit Court of Cook County entitled to Eleventh Amendment immunity); *Ohta v. Muraski*, 1993 U.S. Dist. LEXIS 12693, *34 (D. Conn. 1993) (Clerk of the *Connecticut Superior Court* protected from suit in official capacity by Eleventh Amendment immunity).

**c. WRI, as a Connecticut state court appointed receiver, is protected by Eleventh Amendment Immunity**

Like the state bar organizations and the state court officers and agents discussed in the cases above, WRI is an arm of the court as a state court appointed receiver acting pursuant to that court's authority, and is therefore entitled to Eleventh Amendment immunity from being sued in its official capacity. (Exhibit "A" to RJN.) As noted previously, the Connecticut Supreme Court has held for over a century that "[a] receiver is uniformly regarded as an officer of the court." *Walsh, supra* at 464 (Exhibit "F" to RJN). Just as the state bar created committees and foundations mentioned above are arms of the court, a Connecticut receiver is created and controlled by

the Connecticut Superior Courts under the rules promulgated by the Connecticut Supreme Court. Connecticut Rules of Court, Superior Court Rules, Procedure in Civil Cases, Chapter 18, Receivers, § 485 et seq. (Exhibit "D" to RJN.)

The Eastern District of Washington has recently addressed the issue of whether a receiver is entitled to Eleventh Amendment immunity. *In re: Sundance Corporation, Inc.*, 149 B.R. 641 (E.D. Wash. 1993). In *Sundance* a former state court appointed receiver was sought to be held liable under CERCLA in its personal capacity for environmental contamination. *Sundance*, 149 B.R. at 646-48. The court addressed whether the receiver was entitled to the judicial immunities of its appointing court and upon analyzing the Eleventh Amendment's application to court officers the court stated that " . . . to abrogate a state's Eleventh Amendment immunity from suit Congress must make its intention unmistakably clear in the language of the statute." *Sundance*, 149 B.R. at 658 (citations omitted). The court then concluded that "CERCLA does not, by its terms, unmistakably make clear in unequivocal language that a state's immunity from suit for its judicial activities is waived." *Sundance*, 149 B.R. at 658. The court then concluded its analysis of Eleventh Amendment immunity as it applies to state courts by stating that "*state* judicial immunity protects not only a *state* when invoking its judicial function but also the *court's officers* such as a *receiver* acting under the authority of judicial order." *Sundance*, 149 B.R. at 658. The court in *Sundance* held that Eleventh Amendment immunity applies to a state court receiver being sued in its *personal* capacity for CERCLA liability. *Sundance*, 149 B.R.

at 658. In the instant case, WRI is being sued in its official capacity as receiver for CERCLA liability while acting under the authority of judicial orders and is therefore in an even stronger position than the receiver in *Sundance* for entitlement to Eleventh Amendment immunity as a court officer. This conclusion is further reinforced by the recent *Seminole* decision, as discussed above.

The conclusion that WRI is an arm of the court and therefore entitled to the immunities of the court is also supported by case law providing that officers and agents of the court are viewed as *arms of the court* when applying judicial immunity. Whether or not an officer or agent is an *arm of the court* is a threshold issue in both Eleventh Amendment immunity and judicial immunity analyses.

In *New Alaska Development Corp. v. Guetschow,* the Ninth Circuit held that a receiver is an arm of the court, and as such entitled to absolute derivative judicial immunity when acting in its *normal judicial function. New Alaska Development Corp. v. Guetschow,* 869 F.2d 1298, 1303-04 (9th Cir. 1989). The First Circuit reached a similar result in *Kermit Construction Corp. v. Banco Credito,* in which the court held that "a receiver who faithfully carries out the orders of his appointing judge must share the judge's absolute immunity." *Kermit Construction Corp. v. Banco Credito,* 547 F.2d 1, 3 (1st Cir. 1976).

In addition to receivers, other court related officers and agents are also viewed by the courts as *arms of the court* and therefore entitled to the immunity of the court. For instance, commissioners, conservators and guardians ad litem are viewed as arms of the court and therefore entitled to judicial immunity. *Cok v. Consentino,* 876 F.2d 1,

3 (1st Cir. 1989) (family court-appointed guardian ad litem and conservator were entitled to absolute immunity as agents of the court even though they were non-judicial persons fulfilling quasi-judicial functions); *Ashbrook v. Hoffman*, 617 F.2d 474, 476-77 (7th Cir. 1980) (commissioners appointed by family court to conduct partition sale were entitled to judicial immunity as instruments and arms of the court). Even those that are briefly associated with the judicial process are viewed as arms of the court when performing quasi-judicial functions. *In re: Betts*, 165 B.R. 233, 241 (N.D. Ill. 1994) (a court-appointed private process server is an agent of the court and is therefore entitled to judicial immunity); *Phillips v. Singletary*, 350 F.Supp. 297, 300 (D. S.C. 1972) (physicians appointed by the court to conduct examinations of persons is an arm of the court and while acting in such capacity is afforded the same immunities as other quasi-judicial officers).

There have been no allegations that WRI has acted outside the normal course of its judicial function as defined by the orders of the Connecticut Superior Court. The State of California conceded in its Opposition to WRI's Motion to Dismiss and Alternative Motions that such was the case. (Exhibit "J" to Declaration, p. 4:12 - 5:8.) Like the receiver in *New Alaska* and the other parties mentioned above, WRI is only being sued in its official capacity while acting in its normal judicial function. Further, just as the receiver in *New Alaska* and the other parties mentioned above were entitled to *Judicial immunity* as an *arm of the court*. WRI is entitled to *Eleventh Amendment immunity* as an *arm of the court* in the instant case.

Not only do the Eleventh Amendment and judicial immunity cases discussed above demonstrate that WRI is an *arm of the Court*, but the State of Connecticut itself views receivers as *arms of the court*. The Connecticut courts have uniformly held that a receiver is regarded as an officer of the court. *Walsh, supra* at 464 (Exhibit "F" to RJN); *see also Tucker v. American Insurance Co.*, 3 Conn.App. 397, 398-99 (Conn.App. Ct. 1985) (receiver is an arm and an officer of the court) *citing Links v. Connecticut river Banking Co.*, 66 Conn. 277, 284 (Conn. Sup. Ct. 1895) (Exhibit "H" to RJN); *Parlato v. McCarthy*, 136 Conn. 126, 135 (Conn. Sup. Ct. 1985) (a receiver possessing property in the custody of the law is an officer of the court) (Exhibit "I" to RJN); *Hartford Federal Savings and Loan Association v. Tucker*, 196 Conn. 172, 178 (Conn. Sup. Ct. 1985) (a receiver is an officer of the court appointed on behalf of those seeking an interest in the property) (Exhibit "J" to RJN). Connecticut statutes also support the conclusion that a receiver is an arm of the court. For instance, a Connecticut receiver is subject to the orders of the appointing court and must also file detailed accounts of its actions for approval by the appointing court. Conn. Gen. Stat. §§ 52-504, 52-508 (1994). (Exhibit "E" to RJN.) That Connecticut views its court-appointed receivers as arms of the court presents strong support for the conclusion that WRI is an arm of the Connecticut Superior Court and is therefore entitled to Eleventh Amendment immunity.

As a court-appointed receiver, WRI is an officer and an arm of the court and is fully within the ambit of the appointing court's Eleventh Amendment immunity.

Cases which address the issue of whether a state administrative agency is entitled to Eleventh Amendment immunity are inapplicable [sic] the instant case, because state courts and arms of the state courts are clearly entitled to such immunity as discussed above. In *Excess and Casualty Reinsurance Ass'n. v. Insurance Comm'r.*, the court held that the Florida Insurance Department, acting as ancillary receiver for an insolvent insurance carrier, was not protected by Eleventh Amendment immunity from being sued in a federal interpleader action. *Excess and Casualty Reinsurance Ass'n. v. Insurance Comm'r.*, 656 F.2d 491, 497-98 (9th Cir. 1981). The court noted that because the action before it would not compel or forbid any action by the State of Florida, Eleventh Amendment immunity did not apply to the state *agency*. *Excess*, 656 F.2d at 497-98.

Unlike *Excess*, this case does not involve a state agency; it involves a state superior court which is protected by Eleventh Amendment immunity, and therefore the state agency analysis does not apply herein. Even if such an analysis were applied, the Connecticut Superior Court has expended state funds in appointing and supervising WRI as a receiver, and the Connecticut Superior Court also holds the assets of the receivership in *custodia legis*. More importantly, the Connecticut Superior Court clearly has a vested interest in controlling the receiver pursuant to Connecticut's state laws. The instant action against WRI directly restrains a Connecticut Superior Court from enforcing the state receivership law of Connecticut through that Court's Order which prohibits WRI from being sued without Connecticut Superior Court's consent. (Exhibit "B" to RJN.); *see also Cory v. White*, 457 U.S. 85, 89 (1982) (action against state revenue officers

barred by Eleventh Amendment immunity because a restraint of their action is a restraint on the state). A restraint on a court of the State of Connecticut is a restraint on the action of that State. For these reasons, *Excess* has no application to the present case and WRI, as an arm of the Connecticut Superior Court, is entitled to Eleventh Amendment immunity. As the United States Supreme Court recently made clear in *Seminole*, "[t]he Eleventh Amendment does not exist solely in order to prevent federal court judgments that must be paid out of the state's treasury, . . . it also serves to avoid the indignity of subjecting a state to the coercive process of judicial tribunals at the instance of private parties." *Seminole, supra* at *22-23. The coercive stripping of a Connecticut Superior Court's control over its appointed receiver by another tribunal is such an indignity.

**B. The Narrow Exception to Eleventh Amendment Immunity For Certain Actions By One State Against Another Does Not Apply To Plaintiff's Suit Against WRI**

Although the plaintiff in this case is the State of California and the defendant, WRI, is an arm of the State of Connecticut, this is not an action by one state directly against another such that it falls outside the ambit of the Eleventh Amendment. The language of the Eleventh Amendment does not include actions by one state against another as one of the classes of actions cloaked with immunity; however, the courts have interpreted this exception to the Eleventh Amendment narrowly such that it only applies in circumstances in which the controversy is actually between the two states as sovereigns. This

exception does not apply to the case at bar because the wrong involved is the alleged contamination of the property of private landowners, not of the State of California as a sovereign, and because such wrong was not caused by the State of Connecticut as a sovereign.

### 1. The Supreme Court Has Narrowly Defined An Exception To Eleventh Amendment Immunity For Actions By One State Against Another

The Eleventh Amendment provides that "[t]he Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State."

U.S. Const., amend. XI. Clearly missing from the language of the Eleventh Amendment are actions by one State against another and actions against a State by Citizens of its own State. Supreme Court decisions have held, however, that the language of this amendment is not to be taken literally and have applied its immunity to actions other than those described in the amendment in order to give force to the underlying concept of sovereign immunity of the States. *Pennhurst, supra* at 98 (the greater significance of the amendment is its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III); *Monaco v. Mississippi*, 292 U.S. 313, 322-26 (the letter of the Eleventh Amendment does not exhaust the restrictions upon suits against non-consenting States; a controlling postulate

behind the Eleventh Amendment is that the states retain the attributes of sovereignty).

Based on these fundamental concepts, the Supreme Court has held that, despite the literal language of the Eleventh Amendment, a State may not be sued by one of its own Citizens in Federal Court, *Pennhurst, supra* at 98, *citing Hans v. Louisiana,* 134 U.S. 1 (1894). Further, the Court has held that a State may not be sued by a corporation created by Congress. *Smith v. Reeves,* 178 U.S. 436, 448 (1900). The Court in *Monaco v. Mississippi* and held that a State is immune from suit by a Foreign State without the State's consent. *Monaco, supra* at 320-32. The court noted that the literal language of the Eleventh Amendment does not control and that there are five classes of cases that can be brought against a State:

> " . . . that is, in those brought against a State (a) by another State of the Union; (b) by the United States; (c) by the citizens of another State or by the citizens or subjects of a Foreign State; (d) by the citizens of the same State or by federal corporations; and (e) by Foreign States."

*Monaco, supra* at 328. The court held that actions falling under categories (d) and (e) are controlled by the same rationale and therefore a State may not be sued by a Foreign State without the State's consent, despite the absence of literal language to that effect in the Eleventh Amendment. *Monaco, supra* at 328. The court also noted that the States had waived their immunity from suits by another State when they adopted the Constitution. *Monaco, supra* at 328-29.

Pursuant to Article III of the Constitution and to the absence of immunity for state-versus-state actions in the

Eleventh Amendment, Congress has provided that "[t]he Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States." 28 U.S.C. § 1251(a). The Court had occasion to address the scope of such actions in *Massachusetts v. Missouri,* in which it held that a controversy between two states over tax on a decedent's estate was not a true state-versus-state claim; and therefore the Court refused to exercise its original, exclusive jurisdiction to hear the matter. *Massachusetts v. Missouri,* 308 U.S. 1, 15-19 (1939). The Court held that for a state-versus-state controversy to be properly heard by the Court:

> " . . . it must appear that the complaining state has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible of judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence."

*Massachusetts, supra* at 15. The Court emphasized that "the federal courts may, in their discretion, properly withhold the exercise of the jurisdiction conferred upon them where there is no want of another suitable forum," and that "[g]rounds for justifying such a qualification have been found in considerations of convenience, efficiency and justice." *Massachusetts, supra* at 19 (citations omitted). The Court concluded that Massachusetts was not without a proper and adequate remedy because a suit could be brought in Missouri's state courts. *Massachusetts, supra* at 19-20; *see also McColgan v. Bruce,* 129 F.2d 421, 424

(9th Cir. 1942) (where requirements for the Court's original and exclusive jurisdiction are not met, no other federal court may exercise jurisdiction).

In order for a suit between two states to be a true state-versus-state action such that each State can be said to have waived its immunity from the suit by adopting the Constitution, and such that said suit is within the original and exclusive jurisdiction of the Supreme Court, the rule applied in *Massachusetts* must be met. *See Arizona v. New Mexico*, 425 U.S. 794, 797 (1976) (relying on *Massachusetts*, the Court held that there was not a proper state-versus-state controversy for the exercise of the Court's original and exclusive jurisdiction).

**2. The Present Action Does Not Meet The Requirements Necessary To Bring It within The Narrow State-Versus-State Exception to Eleventh Amendment Immunity**

Applying *Massachusetts* to the instant case, the requirements provided by the Supreme Court for its original and exclusive jurisdiction over state-versus-state actions in the Federal court system are not met herein, and therefore the state-versus-state exception to Eleventh Amendment immunity, as described above in *Monaco*, does not apply.

First, this is not a case where the State of California has suffered a wrong through the actions of the State of Connecticut. The alleged wrong in this case is alleged property contamination in California caused by a California business in which a decedent of Connecticut allegedly had an ownership interest, and which the decedent's

executors and/or trustees allegedly owned or operated. (Exhibit "A" to Declaration.) Second, the plaintiff is not asserting a right against the State of Connecticut which can be enforced by the Federal courts. Although WRI is an arm of the state courts of Connecticut, this Court itself recognized, in its Order of May 28, 1996 denying WRI's Motion to Dismiss, that should this Court assign any liability to WRI, the State of California must seek enforcement of any such judgment in the Connecticut Superior Court. (Exhibit "D" to Declaration, pp. 9:24 - 11:8.) Third, and last, the Connecticut Superior Court is the proper forum in which to make claims against the assets in receivership, and therefore the plaintiff is not without a proper and adequate remedy. For these reasons, this is clearly not a dispute between two States as sovereigns, and therefore this action falls within the protection of Eleventh Amendment immunity. WRI, as an arm of the Connecticut Superior Court, is entitled to Eleventh Amendment immunity from this suit.

The dismissal of WRI from this suit is fully consistent with and required by the Constitutional principles discussed above regarding the application of the Eleventh Amendment to those classes of actions which are heard by Federal courts. True state-versus-state claims can only be heard in the Federal court system by the United States Supreme Court under its original and exclusive jurisdiction. In such cases, the Eleventh Amendment does not apply. For a state-versus-state claim to be properly before that Court, however, the narrow requirements laid down in *Massachusetts* must be met. If these requirements are not met, as in the present case, the Supreme Court will not exercise its jurisdiction. In such cases Eleventh

Amendment immunity applies, unless abrogated by Congress, and the action against the defendant State, or arms of that State, may not be maintained in Federal court. The parties are left to state court forums to resolve their controversy. This action brought by the State of California against WRI may not be maintained because WRI, as a state court appointed receiver, is an arm of the Connecticut Superior Court, and is therefore entitled to Eleventh Amendment immunity from this suit for CERCLA and other associated state law causes of action.

## V.

## CONCLUSION

As discussed above: (1) the State of Connecticut is entitled to Eleventh Amendment immunity from CERCLA and associated state law actions; (2) the Connecticut Superior Courts are arms of the State of Connecticut; (3) WRI, as a court appointed receiver is an arm of the Connecticut Superior Court, and therefore, as an arm of the State of Connecticut, WRI is entitled to Eleventh Amendment immunity; and (4) this is not a true state-v.-state action and therefore it does not fall outside the ambit of the Eleventh Amendment.

Based on the foregoing points and authorities, WRI is fully entitled to Eleventh Amendment immunity from the CERCLA and associated state law causes of action brought by Plaintiff, and WRI therefore respectfully requests that this Court *GRANT* WRI's Motion For Summary Judgment and order WRI to be dismissed with prejudice from this action.

Dated: September ___, 1996

Respectfully submitted,

ROPERS, MAJESKI,
KOHN & BENTLEY

By /s/ Thomas H. Clark
THOMAS H. CLARKE, JR.
ROXANNE R. RAPSON
DENNIS A. DUCHENE
Attorneys for
WESTERN RESOURCES, INC.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

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| STATE OF CALIFORNIA, on behalf of the California Department of Toxic Substances Control,<br><br>Plaintiff,<br><br>v.<br><br>ALBERT CAMPBELL, Individually and as Executor of the ESTATE OF VICTOR MUSCAT, et al.,<br><br>Defendants.<br><br>AND RELATED ACTIONS. | CIV-S-93-604 GEB/JFM<br><br>ORDER<br><br>(Filed Jan. 28, 1997) |

Western Resources, Inc. ("WRI") moves for summary judgment, arguing it is entitled to immunity under the Eleventh Amendment. This precise argument, however, was previously rejected by the Court in denying WRI's motion to dismiss. *See* Order filed May 31, 1996 (see Decl. of W. Coyne filed November 1, 1996, Exh. A, Reporter's Transcript on WRI's motion to dismiss pp. 5-6). What WRI evidently seeks is reconsideration of that adverse ruling.

Absent highly unusual circumstances, reconsideration is appropriate only where the court is presented with newly-discovered evidence, the court "committed clear error or the initial decision was manifestly unjust," or there is an intervening change in controlling law. *School*

*Dist. No. 1J, Multnomah County v. AcandS* [sic], *Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). WRI failed to demonstrate that any of these grounds for reconsideration are present.[1] Accordingly, its motion is denied.

IT IS SO ORDERED.

DATED: January 21, 1997

/s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR.
UNITED STATES DISTRICT JUDGE

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[1] The City of Chico's request for sanctions against WRI pursuant to 28 U.S.C. § 1927 is denied.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| STATE OF CALIFORNIA, on behalf of the California Department of Toxic Substances Control,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>WESTERN RESOURCES, INC., Receiver of the Victor Muscat Testamentary Trusts,<br><br>Defendant/Appellant. | No. 97-15308<br><br>D.C. No. CV-93-00604 GEB<br><br>ORDER<br><br>(Filed Apr. 21, 1998) |

Before: BROWNING, PREGERSON, and HAWKINS, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. app. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.